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The applicable regulatory frame

The Posting of Workers Directive (PWD) was implemented with mainly minor changes to already existing legislation. The two main changes made were the Employment Relations Act 1999 and the Equal Opportunities (Employment Legislation) (Territorial Limits) Regulations 1999. Significantly there are currently no legislative provisions to apply the terms of mandatory or other collective agreements to posted workers. This means that the range of construction collective agreements (NECC, 2005), which are generally accepted by the construction social partners, do not necessarily apply to posted workers and in fact due to the ECJ judgements are potentially threatened. Most notably this includes the building and civil engineering Working Rule Agreement – WRA (CIJC, 2008) and the engineering construction National Agreement for the Engineering Construction Industry – NAEI (NJC, 2010). Posted workers are covered by the national minimum wage but this is below all construction collective agreements and the often higher local rates of pay.

Facts and figures related to posting

Knowledge is piecemeal on numbers, frequency or duration of stay. Findings on the number of E101 certificates issued in EU Member States and Iceland, Norway, Liechtenstein and Switzerland do provide a guide (EC, 2009). Here it is shown that the general situation in the years 2005–2007 remained stable, with initially a slight decrease of 2,000 posted workers in 2006 and a subsequent rise of 1,000 in 2007. In 2007 there were 37,905 posted workers in the UK (8th highest number in the EU) with the three most significant sending countries being France (18,955 – 50% of UK postings); Germany (8,284 – 21.9%); and Poland (3,340 – 8.8%). Unfortunately there is no sectoral breakdown in the figures. Interestingly, though following an ad hoc question asked for Eurostat Hall (2010) identifies a much higher proportion of posted workers in the UK. In the quarter April-June 2008, 181,209 were in 17 sectors of which construction was only the 10th highest. However, informants identified only two sectors with posting, agriculture and construction. Construction had by far the most noted instances of posted workers who were mainly based in the subsector of engineering construction.

Posted worker identification has been complicated by the UK ‘fully’ opening up its labour market after the EU accession of eight Central and Eastern European (CEE) countries in May 2004. What followed was a significant influx of CEE workers (Salt and Millar, 2006). However, the actual numbers, sector placement and employment status of these workers is not fully known as there are limitations to the available administrative and survey data, with CEE workers characterised as initially transient. Recruitment agencies have, though, been identified as significant facilitators of the migration both overall (Currie, 2006) and in some regional construction labour markets (Fitzgerald, 2007). In construction it has also been highlighted that many workers, notably Bulgarian and Rumanian, are coming into the sector as bogus self-employed (Harvey and Behling, 2008).

Registration and notification issues

There is no system of registration or notification of posting or posted workers. This makes it difficult to provide information on the three types of posting as defined in the PWD (posting by specialised subcontractors, in-company posting and posting of temporary agency workers).

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In construction UCATT reported that posting is still 'quite rare' in the building and civil engineering subsector, although it was clearly visible in engineering construction.

Appearances and different types of posting

In agriculture an interviewee reported that in 2008 a number of instances had been uncovered of Bulgarian 'bogus posted workers'; one of these involved 250 workers. Duration of posting was short given the seasonal nature of work and it was now believed that posted workers were not present. Following the unprecedented migration of CEE workers into the labour market, the government restricted access to Bulgarian and Rumanian workers. Only a small number of exceptions were made which included posted and self-employed workers. The exceptions were seemingly perceived as an opportunity by some farmers and Bulgarian companies to ease access into the agricultural labour market. In one case in particular workers were found to be living in squalid conditions. In the cases discussed there was a direct relationship between the client (farmers) and labour contractors (Bulgarian companies), which allowed authorities to conduct a prosecution of the farmer.

In engineering construction posting has been ongoing for a number of years. For example in 2005 at Cottam power station a German utility company RWE was subcontracted to build a flue gas de-sulphurisation (FGD) plant. RWE in turn subcontracted to Austrian firm SFL. SFL supplied both Austrian and Hungarian posted workers, with the Hungarians coming through an SFL subsidiary SAB Ltd and there were approximately 120 poorly treated Hungarian workers. In 2008 there were a number of reported issues with posted workers in the sector. For example during the construction of a new gas fired Grain CHP (combined heat and power) station in Kent, Alstom awarded the Polish company REMAK the boiler element of this project. This led to what is believed to be approximately 220 Polish posted workers at the site for between six and nine months (Unite, 2009). Also on this project the Polish company ZWE Katowice were awarded the 'alignment contract on the site which provided similar employment opportunities'. Following this at a new combined cycle gas power station at Staythorpe (Nottinghamshire) Alstom awarded subcontracts to a number of companies including two Spanish companies Monpressa and FMM. These companies posted 105 and 100 Spanish workers respectively. In all four cases unions spoke to the companies concerned and were informed that no local or UK labour would be employed. These incidents preceded the now infamous Lindsey Oil refinery disputes; here the French client Total initially awarded the contract for a new desulphurisation facility at the site to an American multinational Jacobs Engineering Group. The mechanical piping work was in turn subcontracted to the Shaw Group; certain areas of the project were then subcontracted to the Italian company IREM posting its own workforce of Italian and Portuguese workers. It is believed by Unite that these Portuguese workers were sourced through Portuguese recruitment agencies. It is estimated that around 200 full-time equivalent posted workers were involved (Advisory, Conciliation and Arbitration Service-informant).

Even though the recent Eurostat data point to a notable increase in posted workers this is not seemingly having a significant statistical impact on the labour market. However, when the ramifications of the Lindsey Oil refinery dispute and ECJ rulings are considered, there is a significant perceived impact. For example the construction social partners noted that due to recent ECJ case law the PWD had the potential to be used to pose a significant challenge to the industrial relations' framework. The rulings add weight to arguments that the minimum is now the maximum that is to be applied in construction to posted workers. For example with wages this means only the national minimum wage of £5.80 per hour. A Health and Safety

Executive (HSE) Policy Advisor also commented that the Directive ‘remains a topic of interest that MPs have raised with HSE in the past 12 months’.

Control and enforcement

There is no direct enforcement or control measures with regard to the PWD; instead the Directive is enforced only as a consequence of the enforcement of other laws. In interview the Policy Officer for posted workers (the sole government officer dealing with posting) noted that the key government agencies that might deal with any issues were the minimum wage inspectorate; a ‘robust’ health and safety enforcement system; and the Gangmasters Licensing Act 2004 (GLA), which licences labour providers in agricultural and whose implementation followed significant trade union campaigning and the death of Chinese migrant workers.

In fact the first labour user prosecution under the GLA related to posted workers and involved a farmer who used an unlicensed gangmaster who managed two Bulgarian labour agencies. A multi-agency team (UK Border Agency, the UK Human Trafficking Centre, Gangmasters Licensing Authority, Health and Safety Executive, Tayside Police, Tayside Fire and Rescue Service and Perth and Kinross Council) initially investigated the poor conditions of these workers, then identified their employment status and finally scrutinised the businesses involved. The farmer was fined £500 for not using a licensed labour provider; the UK Border Agency also made him transport workers back to Bulgaria at a cost of £19,000; and HM Inland Revenue have demanded payment of the workers tax and national insurance at a cost of £174,000 (Currie, 2010).

GLA officers reported a number of other incidents of the use of similar ‘bogus’ posted workers by Bulgarian GLA licensed recruitment agencies. In one case a GLA licence to supply labour was withdrawn. The overall working of the GLA demonstrates that a multi-agency partnership can work well at a sector level. Carby-Hall (2010: 10) discusses this approach in detail noting that the GLA has used ‘...an innovative approach by targeting the supply chain to bring about disruption rather than relying on routine inspections’. Although, he does comment that it is estimated that 25% of the supply chain gangmasters operate without a license. Finally, it was reported by the GLA that Bulgarian workers were now being supplied as bogus self-employed rather than bogus posted workers.

In contrast to this agricultural sector framework construction has been identified as a sector in which it is very difficult to enforce regulations. Gribling and Clarke (2006: 2) for one identify ‘...insufficient coordination between different authorities, combined with weak control and enforcement of ...existing regulations’. They highlight that small and medium size firms often do not know of regulations and see compliance as a low priority. So for example with a specific issue like health and safety this is compounded by the fact that due to ongoing government policy inspections of workplaces have been significantly reduced (Tombs and Whyte, 2010; CCA, 2009). In fact there are now only 134 construction inspectors throughout the UK, which means that there is only a small possibility of a site receiving an inspection visit (Fitzgerald and Howarth, 2009).

. [JAN I DO NOT THINK THIS FITS NOW WITHOUT MORE EXPLANATION]

In engineering construction the unions had in place and supported three main initiatives that dealt with enforcement and compliance. The first is via a campaigning approach, which although seemingly distant to the ongoing issue with the Directive on sites has proved a successful strategy when used in agriculture. An example of this approach is a joint union publication of 2004 which had in its title ‘...social dumping: a crisis in the UK engineering

construction industry' (NECC, 2004). More recently following the Lindsey dispute Unite produced a publication entitled 'The case for fair access to employment in the UK engineering construction industry' (2009). Leaflet, poster and sticker 'resources' are available and a website dedicated to the revision of the Directive following the recent ECJ judgements.

Secondly, a key issue is maintaining accurate information on who is actually, or is likely to be, working on site. To this end there is the National Joint Council for the Engineering Construction Industry (NJC). This industry body facilitates opportunities for consultation, discussion and negotiation of key issues, including the PWD, relevant to the overall subsector and individual projects. The framework for these opportunities is laid out in its NAECI national collective agreement (NJC, 2010). Significantly there are specific requirements for employer signatories to the agreement to consult with trade unions. This can be done through such practical means as a prior notification of significant projects in the industry; through Project Joint Councils/Local Forums; and with Major New Construction Projects via Supplementary Project Agreements (SPA). With a SPA it is expected that an independent auditor is appointed for projects and there are clear instructions on the use of an auditor on large projects and what their role involves, including auditing pay levels. The NAECI agreement has an Appendix on *Non-UK Contractors and Non-UK Labour on Engineering Construction Sites*. Here the managing contractor is encouraged to convey a number of early actions to be carried out by foreign subcontractors. These include: that foreign contractors are fully aware of the NAECI agreement; that they have meaningful consultation with trade unions and site stewards; that they provide equality of opportunity for UK workers (including informing local Job Centres of employment opportunities); and that they confirm that they have a workforce that is competent to perform the tasks required.

Lastly, one of the most significant groups involved in compliance and enforcement are the trade union stewards. The NAECI agreement specifically supports site stewards in a number of ways. One example is the National Stewards' Forum, which meets three times per year for two days and involves both GMB and Unite members. Stewards attending do not lose any normal earnings and travel is funded by the trade unions. Activities include invited speakers on important topics and discussion on any issues arising on sites or with main/subcontractors.

Working conditions in theory and practice

The Working Rule Agreement covers major building and infrastructure sites and allied trades and is agreed at the Construction Industry Joint Council. It covers a wide range of skill and craft rate occupations based on 22 subcategories of construction work. This provides an industry minimum which local rates often exceeded; the current national rates are still based on a June 2008 agreement. The agreement states that the working week is normally 39 hours, with shift work 40 hours. Breaks are set by the employer and should not altogether exceed one hour per day, with a lunch break being not less than half an hour. There are agreed overtime rates for working beyond the maximum weekly hours.

An interesting example here with posted workers is the Tyne Tunnels 2 project. The main contractor Bouygues subcontracted part of the contract to Polish and Portuguese contractors. Posted workers were working to WRA steelwork skill rate 1 (£9.82 plus contract bonus) but were only being paid £5.50 per hour which was under the national minimum wage. Employers disputed that the national minimum wage was not being paid and one also argued that as these were posted workers they did not have to pay the negotiated WRA steelwork skill rate 1. A series of meetings were held with the client and main contractor. The Portuguese company PortScope produced what the union believed was a fictitious pay slip.

This showed that a worker was being paid above the minimum wage but a combined payment for holiday pay was included, an illegal practice since a 2006 ECJ ruling (cases C-131/04 and 257/04).

The NAECI agreement provides an industry minimum of six pay grades based on three craft levels and three operative grades. It was re-negotiated following the 2008-2009 disputes. Those covered by the NAECI agreement are expected to work 38 hours per week; these working hours are over a five-day week. If a Saturday/Sunday is part of this working period overtime payment is given. The length of and facilities for breaks are at the discretion of the employer after consultation with the local officers of the signatory trades unions. There is provision for a daily-unpaid meal break of 30 minutes duration and one paid refreshment break of 10 minutes duration. The agreement makes specific reference to foreign workers, including posted workers, emphasising that foreign contractors must comply with the NAECI provisions around the scheduling and taking of periodic leave.

With the NAECI agreement examples of its operation with regard to posted workers are the case of SFL (SAB Ltd) in 2005. Hungarian workers were found to be receiving £816 - £1,020 per month, which was below the NAECI rates and national minimum wage. A posted worker reported that the equivalent Hungarian wage was £326 per month. Following union industrial action an audit system was set-up of wages, with SFL transferring wages from an offshore bank account into workers own Hungarian accounts. However, a posted worker reported that a 'managing' fee of £2,380-£2,584 per month was being taken from the final wage that workers received in their personal bank accounts. The union again resorted to industrial action and temporary UK bank accounts were set-up for Hungarian workers. This audit scheme has now been developed and is incorporated into the recent NAECI agreement (NJC, 2010).

SFL (SAB Ltd) posted workers were also reported to be working a six-day week, with a nine and a half hour day Monday to Friday and up until early Saturday afternoon. There were no rest or tea breaks and no provision was made to the workload to accommodate periods of inclement weather. This was clearly all contrary to NAECI and underpinned the disputes discussed. With the Lindsey dispute there were two key issues with working time reported (Acas, 2009). The first was that the unions believed that posted workers were not able to take rest breaks during their shifts; management disputed this arguing that these were added to the midday lunch break. As significantly workers were changing into their protective clothing and preparing for a shift prior to the shift starting. Local practice was that this was undertaken at the beginning of each shift. Workers were being paid on a lump sum basis of a fixed number of hours in which to complete the job.

Both the WRA and NAECI have separate literature on the issue of health and safety, for example the NJC Guide to Health, Safety and Welfare. However, a recent Irwin Mitchell Solicitors report highlights that migrant worker deaths in construction have increased from two in 2002-2003 to twelve in 2007-2008 (CCA, 2009). The unions do have recognised safety representatives at the workplace with legal representation, investigation and inspection rights; though this right can be difficult to enforce. HSE informants commented that if they received a health and safety complaint they would involve a recognised union safety representative in any investigation.

Unite nationally reported that prior to the recent NAECI agreement it was left for subcontractors to decide if their operatives were competent to undertake onsite tasks. A Unite official who was central to the Lindsey dispute gave two examples of potentially dangerous

working. The first involved posted workers welding above other workers and the second posted workers moving their own scaffolding.. The renegotiated NAECI makes it a requirement that managing contractors ensure that foreign contractors are aware of the requirements of health and safety and that the workforce must be fully competent to perform the contract tasks.

The WRA agreement and NAECI agreement contain daily allowances for travelling and there is a subsistence allowance per night for accommodation. Unite commented that local and regional officials believed ‘over the years’ that posted workers were having deductions taken out of their wages for accommodation and travel, but hard evidence was difficult to obtain. SFL (SAB Ltd) did provide flights back to Hungary once a month; however with regard to accommodation the situation was very poor. It was found that there was at any one time between eight and ten people living in a small terraced house. The employer though seemed to be aware of local council inspections as posted workers were ordered to take some beds out of the house and ‘hide’ them. These were replaced once the inspection had taken place. With the Lindsey dispute posted workers lived on barges in Grimsby docks away from the local population. Apart from clear integration issues this caused a loss of income for the local community. The Acas informant commented that due to this Unite had formed an alliance with the local chamber of commerce and a number of businesses in the local hospitality, hotel, restaurant and caravan park trades.

Assessment

The numerical impact of posted workers on the labour market is limited and with the fragmented nature of the construction supply chain it can be difficult to identify posted workers. Only in the engineering construction subsector was there an identified ongoing impact, which had caused significant industrial relations challenges. The key social partners in this subsector support the renegotiated national agreement. From an employer perspective financial penalties and the cost of non-completion on time are of paramount importance. Whilst from a union perspective the NAECI national agreement provides guaranteed terms and conditions. There are also a number of ‘safeguards’ to make sure that these industry rates and standard practices are followed by foreign contractors. This would seem to indicate that both employers and unions remain as firm social partners. However, there are tensions in this relationship; on the employer side this involves some clients and those outside of the employer associations seeking to move away from the NAECI sector agreement and potentially on the trade union side stewards and members who fear unemployment due to increases in posted workers.

Underlying this potential conflict are two combined factors, the first is demographic with engineering construction having an ageing workforce with over sixty-five percent of workers over 40 and forty-one percent over 50 (Gibson, 2009). Second, is an ongoing skills crisis. Due to these what is likely to happen, not just in engineering construction but also in the sector as a whole, is the perpetual introduction of migrant workers. Given the particular skills that are needed in engineering construction these may well be posted workers and opportunities exist for subcontractors to introduce a cheaper alternative to the labour already deployed.

Fundamental to the construction sector is the growing government and employer disdain for enforcement and regulation (CCA, 2009; Tombs and Whyte, 2010). This leaves the trade unions and ‘good’ employers to counter the worst excesses of any poor treatment of workers. As noted earlier there is a potential that given the ECJ rulings the minimum may become the maximum for a range of posted workers, with dire consequences for the sector. In engineering

construction the new NAECI ‘safeguards’ of industry rates and the ‘standard practices to be followed by foreign contractors’ are a workable framework for equal treatment on site.

Both the WRA and NAECI have provisions that guarantee representation and negotiation. With posted workers it is clear that even though these rights are in place they have not on the whole been exercised. For example the Tyne Tunnels 2 project provides a good case in point where the union went to the lengths of having leaflets printed in Portuguese for posted workers. Even though they were able to obtain a posted workers contract they admitted that full communication was limited and no one joined the union. With engineering construction the real success came in 2005 when the unions were able to recruit some SFL (SAB Ltd) workers and one of these provided vital information, which led to the development of the audit process that is now a main safeguard in the NAECI.

This report highlights four main issues with regard to posted workers. The first is that identification and communication with these workers can often be difficult and this is not just because of language and cultural barriers. Secondly this makes the ‘integration’ of posted workers onto construction sites a real challenge. This includes not only issues around such areas as breaks and adequate canteen facilities but also with regard to working practices including health and safety. Thirdly, a lack of integration can mean there is a lack of accurate information on, and about, posted workers. Leading initially to rumours which can all too easily become ‘facts’ and ultimately industrial unrest. Lastly, this can mean poor working and living conditions for posted workers. Three good practices begin to break with this cycle: the sector framework of the Gangmaster Licensing Act which should be extended to construction, the network of the NAECI supported National Stewards’ Forum and the NAECI audit of posted workers wages and conditions that provide a fact based transparent process.

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